BEFORE THE

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

In the Matter of the Discharge of Hazardous Substances Allegedly Caused by Sta-Rite Industries, Inc. in the Village of Deerfield, Dane County, Wisconsin	)))))	Case No. IH-95-21

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 17, 1995, the Department of Natural Resources issued Order No. 94-SDEE-125 to Sta-Rite Industries, Inc., requiring it to take the actions necessary to investigate and remediate alleged solvent contamination emanating from the former Sta-Rite property in the Village of Deerfield, Wisconsin. On September 18, 1995, the Department received a petition for a contested case hearing, pursuant to sec. 227.42, Stats., from Sta-Rite Industries, Inc.. On October 4, 1995, the Department granted the request for a contested case hearing.

On December 15, 1995, the Department filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was conducted on May 1 and 2, 1996, in Madison, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The Department filed its written brief on June 19, 1996 and the petitioner filed a response brief on July 23, 1996. The Department was given an opportunity to file a reply brief. By letter filed on August 13, 1996, the Department advised the Administrative Law Judge, it did not intend to file a reply brief.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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Applicable Law

Sec. 144.76(3), Stats., provides:

> A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

Sec. 144.76(1)(a), Stats., provides:

> "Discharge" means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.

FINDINGS OF FACT

1. On January 29, 1992, the chlorinated hydrocarbons 1,1 dichloroethene (also spelled 1,1 dichloroethylene, abbreviated as 1,1 DCE), cis 1,2 dichloroethene (also spelled cis 1,2 dichloroethylene, abbreviated as cis-1,2-DCE), 1,1,1 trichloroethane (1,1,1 TCA) and trichloroethene (also spelled trichloroethylene, abbreviated as TCE) were detected in groundwater samples collected from the City of Deerfield's Municipal Well 2. 1,1 DCE, cis-1,2-DCE, 1,1,1 TCA, and TCE are contaminants for which Maximum Contaminant Levels (MCLs) have been established for safe drinking water. In March, 1992 Municipal Well 2 was taken out of service because the contaminant levels exceeded MCLs found in sec. NR 809.24, Wis. Adm. Code.

2. The Village of Deerfield Municipal Well 2 is located at the intersection of Main Street and Industrial Park Road on the north side of Deerfield. On February 5, 1994, the Department of Natural Resources (Department) received approval to expend state funds to begin an investigation into possible sources of the contamination. The investigation included personal interviews, inspections of facilities in the area which used the contaminants detected in Municipal Well 2, and soil and groundwater sampling. The Department also contracted with Woodward-Clyde consultants to determine the source of the contaminants in Municipal Well 2.

3. During the investigation Department employees found significant soil and groundwater contamination just north of the Hilleque Creative Laminates (HCL) building

located at 40 West Nelson Street in the Village of Deerfield (the site). The HCL building was formerly owned by Sta-Rite Industries, Inc. (Sta-Rite). Sta-Rite purchased the property from Borgerud Manufacturing Company in July, 1967, and sold it to ARB Enterprises on September 12, 1984. Sta-Rite operated a brine tank manufacturing plant at the site from 1967 until 1984.

4. Former Sta-Rite employees testified that when they worked for Sta-Rite they used solvents to clean fiberglass resin from the molds used in the production of fiberglass brine tanks and they were directed to pour the leftover fiberglass resin and solvents on the ground north of the current HCL building. Employees disposed of approximately ten to twelve gallons of leftover resin and cleaning solvent per work shift in this manner. There was normally one work shift per work day although sometimes there were two shifts per day. There were normally five work days per week. The practice of dumping leftover resin and cleaning solvent ended in February, 1978.

5. Fiberglass resin is primarily styrene. The solvent used to clean the molds was identified by the former Sta-Rite employees as Xylo. Xylo is primarily xylene. Xylene and styrene are hazardous substances for purposes of sec. 144.76(3), Stats. Xylene and styrene are both listed at sec. NR 140.10, Wis. Adm. Code, as substances of public health concern. Pursuant to sec. 160.05(6)(b), Stats., the Department in determining whether a substance is one of public health concern must take into account the degree to which the substance may:

1. Cause or contribute to an increase in mortality;

2. Cause or contribute to an increase in illness or incapacity, whether chronic or acute;

3. Pose a substantial present or potential hazard to human health because of its physical, chemical or infectious characteristics; or

4. Cause or contribute to other adverse human health effects or changes of a chronic or subchronic nature even if not associated with illness or incapacity.

The phrase "hazardous substance" is defined at sec. 144.01(4m), Stats. The definition is:

> "Hazardous substance" means any substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

A substance of public health concern falls within the definition of a hazardous substance. No expert testimony is required to find xylene and styrene are hazardous substances.

6. As part of their investigation, the Woodward-Clyde consultants drilled a series of monitoring wells and analyzed soil samples. One of the monitoring wells, identified as monitoring well 14, was drilled on the HCL property at the location where Sta-Rite employees dumped leftover resin and cleaning solvent. Soil samples were tested by gas chromatographic screening (GC). GC soil screening was done at the site and additional soil samples were analyzed by laboratory GC. Groundwater at the site was also tested at various depths.

Detailed test results are set forth in table form in exhibit 15. The following tables are taken from plate 1 of exhibit 15. These tables summarize the soil (vadose-zone) and groundwater contaminant concentrations found at the site. The monitoring wells were installed at the water table. At four of the sites wells with an intermediate-depth piezometer were also installed. In the reports, the wells completed at the water table are referred to as shallow wells and denoted with an "S," for example MW-14S. The intermediate-depth piezometer wells are denoted with an "I," for example, MW-14I. All data are measured in parts per billion (ppb).

ZADOSE-ZONE (GC screening)

Substance	Concentration
c 1,2 DCE	2600 ppb
1,1,1 TCA	280 ppb
TCE	350,000 ppb

VADOSE-ZONE SOIL (laboratory)

Substance	Concentration
2-butanone	13,000 ppb
TCE	34,000 ppb
tetrachloroethylene (PCE)	1,200 ppb
styrene	220 ppb
xylene	3700 ppb
4 methyl 2 pentanone	240 ppb
ethyl benzene (Ebenz)	930 ppb

MONITORING WELL 14S

Substance	Concentration
c 1,2 DCE	14,000 ppb
TCE	230,000 ppb

MONITORING WELL 14I

Substance	Concentration
c 1,2 DCE	13,000 ppb
TCE	290,000 ppb

7. Woodward-Clyde also drilled a monitoring well, identified as MW-10, a short distance to the east of MW-14. With respect to the flow of groundwater MW-10 is downgradient from MW-14. Test results from MW-10 as summarized on plate 1 of exhibit 15 are as follows:

MONITORING WELL 10S

Substance	Concentration
1,1 DCE	1 ppb
1,1,1 TCA	100 ppb
TCE	8 ppb
Toulene (Tol)	1 ppb

MONITORING WELL 10I

Substance	Concentration
1,1 DCE	5,000 ppb
1,1,1 TCA	69,000 ppb
TCE	19,000 ppb
1,1 Dichloroethane (1,1 DCA)	2,700 ppb
1,1,2 TCA	50 ppb
Carbon Tetrachloride	1,000 ppb

8. Monitoring wells MW 1 and MW 5 are the next two monitoring wells downgradient from MW 10. Test results from these two wells as summarized on plate 1 of exhibit 15 are as follows:

MONITORING WELL 1S

Substance	Concentration
c 1,2 DCE	25 ppb
Benzene (Benz)	73 ppb
Toulene (Tol)	0.7 ppb

MONITORING WELL 1I

Substance	Concentration
c 1,2 DCE	250 ppb
TCE	130 ppb
Benz	63 ppb
Ebenz	20 ppb

MONITORING WELL 5S

Substance	Concentration
Vinyl Chloride (VC)	7 ppb
1,1 DCE	0.7 ppb
c 1,2 DCE	340 ppb
TCE	750 ppb
Benz	4 ppb
Tol	12 ppb
Ebenz	1 ppb
Xylene	7 ppb

MONITORING WELL 5I

Substance	Concentration
c 1,2 DCE	7500 ppb
TCE	19,000 ppb
Trans-1,2 Dichloroethylene (T 1,2 DCE)	58 ppb
VC	250 ppb

9. Contamination of the soil and groundwater on the former Sta-Rite property exists. Absent the discovery of another source of contaminants between MW 10 and MW 1, it is also possible that the chlorinated hydrocarbons detected in MW 1 and MW 5 are seeping from the former Sta-Rite property. Although this contamination was discovered as part of the investigation to determine the source of the contaminants in Municipal Well 2, the Department is not alleging that these contaminants are the source of the contamination in that well.

10. The record contains strong evidence that an ongoing discharge of chlorinated hydrocarbons is occurring from the former Sta-Rite property. However, the Department has failed to prove that Sta-Rite is a responsible party for this discharge.

11. The Department has shown that Sta-Rite employees did dump styrene and xylene onto the ground at the former Sta-Rite property. However, styrene was only detected in the vadose zone at the site. The record contains no evidence of an ongoing discharge of styrene. Xylene was detected in the vadose zone at the site and in MW 5S. Although xylene was detected off site, it is not clear that the source of the xylene detected in MW 5S is the xylene improperly disposed of by Sta-Rite employees.

Xylene is a non chlorinated hydrocarbon normally associated with gasoline. There are references in the record, particularly exhibit 15, to other possible sources of gasoline-related hydrocarbons. Additionally, no xylene was detected in monitoring wells, MW 10 or MW 1, which are located between MW 14 and MW 5. Based on the evidence in the record, one can not conclude that the xylene improperly disposed of by Sta-Rite employees has discharged onto any neighboring properties.

DISCUSSION

At the hearing exhibit 15, volume I of Woodward-Clyde's investigation report, was admitted to the record. Sta-Rite objected to the admission of this exhibit because it contained expert opinion. Sta-Rite was given the opportunity to submit a redacted version of exhibit 15. The redacted version submitted by Sta-Rite deleted not only expert opinion from the

report, but also, hearsay and some factual conclusions made by the consultants. Some of the redacted material is necessary to understand the geochemical evidence in this case.

It would be an unwarranted waste of time to review each line of exhibit 15 which was deleted and decide whether it is admissible. The original exhibit 15 will remain in the record and will not be replaced by the redacted version submitted by Sta-Rite. The hearsay in exhibit 15, for the most part, is corroborated elsewhere in the record. Some of the factual conclusions may be mixed with the opinions of the consultants; however, none of this evidence is the basis of any finding of fact in this decision. Sta-Rite has not been prejudiced by the admission of this exhibit.

Ultimately, the Department's case primarily fails on the basis of one factual issue and one legal issue. The soils and groundwater at the former Sta-rite property contain high levels of chlorinated hydrocarbons, primarily TCE. The factual issue which the Department failed to prove is that Sta-Rite caused the discharge of any chlorinated hydrocarbons. The Department presented evidence that Sta-Rite employees poured styrene and xylene unto the ground at the site; however, there is no evidence that TCE or any of the other detected chlorinated hydrocarbons were similarly disposed of at the site.

On page five of its initial brief, the Department states, "[g]iven the high levels of TCE in the soil and groundwater at MW-14 and in the groundwater at MW-10 and MW-5, Sta-Rite likely used TCE throughout the period of its operations at the Deerfield property." The Department is relying on the fact that TCE was detected at the site to prove that Sta-Rite used TCE and improperly disposed of it. This does not satisfy the Department's burden of proof. The Department did not show that Sta-rite used TCE or any other chlorinated hydrocarbon, let alone that any such solvent was improperly disposed of at the site.[1]

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[1]With respect to the other contaminants detected in the zone and groundwater at the site, the strategy of the Department apparently was to rely on Sta-Rite's witnesses to show that TCE or other chlorinated hydrocarbons were used by Sta-Rite. Sta-Rite did not call any witnesses at the hearing and the Department did not call any of them adversely.

The Department also offered exhibit 41. Exhibit 41 is a letter and quarterly customer reports indicating Sta-Rite purchased a product called "T1431" from Ashland Chemical. According to material safety data sheets which are also part of exhibit 41, T1431 contains TCE. This document was not admitted because the Department was unable to lay a foundation for the exhibit. However, even if exhibit 41 had been admitted, it is hearsay. A finding of fact can not be based solely on uncorroborated hearsay. Village of Menomonee Falls v. DNR, 140 Wis.2d 579, at 610, 412 N.W.2d 505 (Ct. App. 1987). This document alone is insufficient to prove that Sta-Rite used TCE. It is noteworthy that in their report (exhibit 15), the Woodward-Clyde consultants note that "[i]nformation obtained by the [Department] indicates that Sta-Rite used 2-Butanone as a solvent." There is not a similar

The legal issue is even if one finds that Sta-Rite employees improperly disposed of the hazardous substances existing in the vadose zone and groundwater at the former Sta-Rite site, whether Sta-Rite is a responsible party within the definition of sec. 144.76(3), Stats. Sec. 144.76(3), Stats., imposes responsibility on either a person who causes a hazardous substance to be discharged or one who possesses or controls a hazardous substance which is discharged.

The effective date of sec. 144.76(3), Stats., is May 21, 1978. The evidence in the record indicates that any activity on the part of Sta-Rite employees which caused the discharge of hazardous substances in this case occurred prior to the effective date of sec. 144.76(3), Stats. Therefore, Sta-Rite can not be found to be a person who caused a discharge of a hazardous substance. Nor can Sta-Rite be found to be a person who possess or controls a hazardous substance which is being discharged. Sta-Rite sold the subject property in 1984. After the date of the sale, Sta-Rite no longer possessed or controlled the hazardous substances which were being discharged (assuming the hazardous substances were in fact on the property in 1984).

Sta-Rite contends that sec. 144.76(3), Stats., only applies to ongoing discharges. Under this theory, any responsibility on the part of Sta-Rite would have ended upon the sale of the property. It is not clear that the legislature intended this interpretation. However, if the legislature intended a person to remain a responsible party after the sale of the property, then a statute of limitation must apply to the situation. The last date Sta-Rite possessed or controlled any hazardous substances being discharged from its former property was September 12, 1984. The date the enforcement order was issued was August 17, 1995. The applicable statute of limitation is either sec. 893.93(1)(a), Stats., (six years) or sec. 893.87, Stats., (ten years). Under either of these sections, the statute of limitation for any liability on the part of Sta-Rite ran before the enforcement order was issued to Sta-Rite.

In the instant case, the Department attempts to combine the two components of sec. 144.76(3), Stats., to find that Sta-Rite is a responsible party. The Department has shown that Sta-Rite employees caused the discharge of hazardous substances and that those hazardous substances are continuing to be discharged from the former Sta-Rite property. This represents an expansion of the definition of "responsible party" beyond the holding in State v. Mauthe, 123 Wis. 2d 288, 366 N.W.2d 871 (1985). It may be good policy to target an enforcement action against the entity whose actions allegedly resulted in the discharge;

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note with respect to TCE.

Finally, even if one found that Sta-Rite used TCE, there is no evidence that it was improperly disposed of by Sta-Rite. The Department seems to be relying on a theory that if it shows that Sta-Rite improperly disposed of styrene and xylene, it follows that Sta-Rite improperly disposed of other hazardous substances it is known to have used.

however, it is not clear that it is within the scope of the statutory definition of responsible party. Because the finding is that the Department did not meets its burden of proof that Sta-Rite caused the discharge of any hazardous substance it is not necessary to make a finding on this issue.

The Department is attempting to prove that hazardous substances were mishandled at the most recent twelve years ago. This is obviously a difficult thing to prove. The statute bases responsibility on not only actually causing the discharge of a hazardous substance, but also mere possession or control of the hazardous substance. The Wisconsin Supreme Court has found that the legislature intended to make one a responsible party simply by owning land from which contaminants are seeping onto neighboring properties. This can be accomplished by soil testing. The difficulty in showing who specifically dumped a hazardous substance is undoubtedly a reason for this broad definition of responsible party. It is also probably the reason why enforcement orders are typically directed towards property owners rather than the persons whose activities resulted in the discharge. See, for example, Foss v. Madison Twentieth Century Theaters, 203 Wis.2d 210, 551 N.W.2d 862 (Ct.App. 1996). The current owner of the property has not been joined in this action.

CONCLUSIONS OF LAW

1. Styrene and xylene are hazardous substances as defined by sec. 144.01(4m), Stats. The Department has shown that Sta-Rite employees routinely poured a mixture of styrene and xylene onto the ground at the former Sta-Rite property in Deerfield; however, this disposal of styrene and xylene occurred prior to the effective date of sec. 144.76(3), Stats.

2. Pursuant to sec. NR 2.13(3)(a), Wis Adm. Code, the Department of Natural Resources has the burden to prove that Sta-Rite Industries, Inc., is a responsible party pursuant to sec. 144.76(3), Stats., with respect to the discharge of hazardous substances found on the subject site. The Department has failed to satisfy this burden. The Department has not shown that a discharge of styrene or xylene within the meaning of the definition of "discharge" set forth at sec. 144.76(1)(a), Stats., has or is occurring. Nor has the Department shown that Sta-Rite has caused the discharge of any of the chlorinated hydrocarbons which do appear to be seeping from the former Sta-Rite property onto neighboring properties.

3. Pursuant to sec. 227.43, Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, order No. 94-SDEE-045 is dismissed.

Dated at Madison, Wisconsin on November 6, 1996.

STATE OF WISCONSIN
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

ORDERSTARIT.MJK

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.